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No. 438

In the Supreme Court of the United States

October Term, 1944

HOUDAILLE-DUVAL, OHLEMACHER INC., AND HOUDAILLE SALES CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 438

HOUBIGANT INC., CHERAMY INC., AND HOUBIGANT SALES CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 132) is reported in 139 F. (2d) 1019.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 9, 1944 (R. 145). The petition for a writ of certiorari was filed on September 6, 1944. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act as amended (52 Stat. 111, 15 U. S. C. 45) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether enactment of the Federal Food, Drug and Cosmetic Act removed jurisdiction to proceed under Section 5 of the Federal Trade Commission Act against unfair methods of competition involving the misleading labeling of cosmetics.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, prior to its amendment by the Act of March 21, 1938, 52 Stat. 111, provided in part as follows:

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * *, from using unfair methods of competition in commerce.[1]

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[1] The Commission instituted this proceeding before, but concluded it after, Section 5 was amended by the Wheeler-Lea Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45. The Section as amended provides in part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * *, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

This proceeding would be governed by the broader amendment of 1938 (*Ziffrin, Inc.*, v. *United States*, 318 U. S. 73; *Vandenbark* v. *Owen-Illinois Glass Co.*, 311 U. S. 538), but Section 5 of the earlier law, if Section 5 applies, was obviously sufficiently comprehensive to cover petitioner, and petitioner makes no claim to the contrary.

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission issued an order directing petitioners to desist (1) from using the terms "Paris" or "Paris, France", or other terms indicative of foreign origin, and (2) from using the words "Houbigant", "Cheramy", or any other foreign words or terms as brand or trade names for toilet preparations made or compounded in the United States, without stating in immediate conjunction therewith that such products are made or compounded in the United States (R. 115–116). The court below stated that petitioners objected only to clause (2) of the Commission's order (R. 132), and we interpret the petition for writ of certiorari as being also limited to clause (2).

The Commission's findings, which petitioners do not question, show the following:

Petitioners Houbigant, Inc., and Houbigant Sales Corporation use in the sale of certain toilet preparations labels, containers, and bottles carrying the words "Houbigant" or "Houbigant-Paris-New York." For many years, perfumes, colognes, and toilet preparations of high quality have been manufactured by La Perfumerie Houbigant of Paris, France, and distributed in this country under the name "Houbigant" and a substantial part of the purchasing public associates this word with the products of the Paris concern. Its products have general consumer acceptance and, in

addition, perfumes and toilet preparations manufactured in France command higher prices in this country than those of United States manufacture because of the buying public's preference for the former. (R. 110–112.)

Houbigant, Inc., has been authorized by La Parfumerie Houbigant to make and distribute in the United States products compounded according to the formulae of the Paris concern (R. 111). Houbigant, Inc., in making perfumes, colognes, and toilet preparations, mixes perfume products imported in the form of concentrates with domestic alcohol and with certain imported fixatives or essential oils or synthetic materials (R. 113).

The practices and course of business of petitioner Cheramy, Inc., are similar to those of the Houbigant petitioners, the French concern in its case being Parfums Cheramy S. A. (R. 111, 113).

Petitioners' representations have misled a substantial part of the purchasing public as to the origin and place of manufacture of petitioners' products and have diverted trade unfairly from competitors who actually import perfumes and similar products from foreign countries or who sell products of domestic manufacture and truthfully represent their origin (R. 113–114).

The court below, on the authority of prior decisions of that court, held in a *per curiam* opinion that the Federal Food, Drug and Cosmetic Act of June 25, 1938, 52 Stat. 1040, 21 U. S. C. 301,

et seq., had not vested in the Federal Security Administration, which administers that Act, exclusive jurisdiction over the labeling of perfumes (R. 132–133).

ARGUMENT

Petitioners contend that the Federal Food, Drug and Cosmetic Act of June 25, 1938, is exclusive as to matters within its purview and that Section 5 of the Federal Trade Commission Act therefore does not apply to any unfair method of competition which constitutes a violation of the later statute. Both court decisions and administrative construction of the Trade Commission Act are squarely contrary to this contention.

Under Section 2 of the Food and Drug Act of June 30, 1906 (34 Stat. 768, 21 U. S. C. 2), it has long been a federal offense to sell any misbranded food or drug in interstate commerce. For many years the Federal Trade Commission has exercised concurrent jurisdiction with those charged with enforcing the Food and Drug Act, and the authority of the Commission to deal with misleading labeling of food under circumstances in which the false labeling is a misbranding prohibited by the Food and Drug Act has been uniformly sustained by the courts.[2] The authority of the Commission

[2] *Royal Baking Powder Co.* v. *Federal Trade Commission*, 281 Fed. 744 (C. C. A. 2); *Federal Trade Commission* v. *Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6); *Federal Trade Commission* v. *Morrissey*, 47 F. (2d) 101 (C. C. A. 7).

Section 10 of the Food and Drug Act, 21 U. S. C. 10, provided that a food was misbranded if it was an imitation of or

to prohibit as an unfair method of competition conduct which is "misbranding" contrary to the Food and Drug Act was specifically passed upon and upheld in *Justin Haynes & Co.* v. *Federal Trade Commission,* 105 F. (2d) 988, 989 (C. C. A. 2), and this point was one of the "questions presented" in the petition for certiorari, but certiorari was denied, 308 U. S. 616.

The Food and Drug Act was repealed by the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040. (See note to 21 U. S. C. A. 392.) The later Act is, in substance, amendatory in nature. It continued the prohibitions of the prior statute, the principal changes being a refinement and expansion of the definitions of misbranding and adulteration, authorization of equity proceedings to enjoin violations, and bringing cosmetics under the statute. There clearly is no reason for regarding this legislation as being any more exclusive than the Food and Drug Act which it superseded.

Petitioners (Pet. 12) rely upon an amendment to the Federal Trade Commission Act made by the Wheeler-Lea Act of March 21, 1938, 52 Stat. 114, as showing that Congress intended to deprive the Federal Trade Commission of jurisdiction to deal with the labeling of foods, drugs, and cosmetics.

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offered for sale under the distinctive name of another article, or if it was labeled or branded so as to mislead the purchaser, or if its package or label bore any statement regarding ingredients which was false or misleading.

The Wheeler-Lea Act amended Section 5 of the Federal Trade Commission Act in respects not now material, and added to the original statute Sections 12, 13, 14, and 15 (15 U. S. C. 52–55). Section 12 makes it unlawful to disseminate in interstate commerce any false advertisement which is likely to induce the purchase of foods, drugs, or cosmetics. Section 13 authorizes the Commission to bring proceedings in the federal district courts to enjoin violations of Section 12, and Section 14 imposes criminal penalties for violation of Section 12. Section 15 provides in part:

> For the purposes of sections 12, 13, and 14—(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading * * *.

The express exclusion of labeling from the new authority granted to the Commission, without any such exclusion respecting its authority to proceed administratively under Section 5 against unfair methods of competition or unfair or deceptive acts or practices, plainly leaves the authority conferred by that Section untouched. In *Fresh Grown Preserve Corp.* v. *Federal Trade Commission,* 125 F. (2d) 917, 919 (C. C. A. 2), the court, in rejecting the contention that the definition of "false advertisement" in the new Section 15 operated to limit the scope of Section 5 so as to exclude therefrom any false labeling of foods, drugs, or cosmetics, said:

> The additions found in §§ 12 to 15, inclusive, were also to give the Commission greater control over the advertising of food, drugs, cosmetics and the like by providing for criminal action as well as injunction; and only in proceedings under such sections is the definition of false advertisement in § 15 relevant, not in a proceeding like this under § 5.

Petitioners assert (Pet. 4) that the decision below is in conflict with three decisions of circuit courts of appeals of other circuits. We submit that there is no conflict of decisions.

In *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673 (C. C. A. 8), the Commission's order prohibited a nonprofit membership corporation conducting a grain exchange from engaging in certain acts and practices injurious to another membership grain exchange. The Chamber of Commerce contended that the Commission was without jurisdiction because Congress had exercised its regulatory power over grain exchanges by the Grain Futures Act and this legislation was exclusive of all other regulatory statutes applicable to these exchanges. The court, however, held (pp. 685–686) that the Commission had jurisdiction and that its order was valid except to the extent that it was in "conflict" with the provisions of the later statute. In the instant case, there is no conflict between the order of the Commission and the provisions of the Federal Food, Drug and Cosmetic Act.

In *United Corporation* v. *Federal Trade Commission,* 110 F. (2d) 473 (C. A. A. 4), the court held that the Commission had no jurisdiction to deal with acts or practices which are subject to regulation under the Packers and Stockyards Act. The ground of decision was that both Section 5 of the Federal Trade Commission Act, as amended, and Section 406 of the Packers and Stockyards Act, 7 U. S. C. 227, expressly excluded from the jurisdiction of the Commission persons and matters subject to regulation under the Packers and Stockyards Act.

George H. Lee Co. v. *Federal Trade Commission,* 113 F. (2d) 583 (C. C. A. 8), simply held that where the falsity of certain representations had been put in issue and decided in a judicial proceeding brought by the United States to enforce the Food and Drug Act, the falsity of the same representations was *res adjudicata* in a proceeding brought by the Federal Trade Commission against a party defendant in the prior litigation.

Petitioners also state (Pet. 4) that the decision below is in conflict with *United States* v. *Lee,* 40 F. Supp. 801 (E. D. Wis.). The holding there was that the definition of labeling in the Federal Food, Drug and Cosmetic Act should be construed in connection with the jurisdiction over false advertisement of these commodities given the Federal Trade Commission by the Wheeler-Lea Act. But, as we have previously stated, the new Sections added by that Act do not determine the Com-

mission's jurisdiction under Section 5 of the Federal Trade Commission Act. Furthermore, the district court's decision was reversed in *United States* v. *Lee,* 131 F. (2d) 464 (C. C. A. 7), where the court held that the same conduct may fall within the ban of both the Federal Food, Drug and Cosmetic Act and the Sections of the Federal Trade Commission Act added by the Wheeler-Lea Act.

CONCLUSION

The decision below is clearly correct, and there is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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